



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 12, 1994

Richard Rafes, J.D., Ph. D.
Vice President for Legal Affairs
and General Counsel
University of North Texas
Health Science Center at Fort Worth
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OR94-644

Dear Dr. Rafes:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27245.

The University of North Texas (the "university") has received several requests for information relating to an equal opportunity investigation regarding alleged sexual harassment. Specifically, the requestors seek records "pertaining to statements attributed to [them] regarding the investigation of Elisabeth Warren." You advise us that the university has or will make available to the requestors some of the requested information. You have submitted the remaining information to us for review, however, and seek to withhold it under sections 552.101 and 552.102 of the Government.¹

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

¹Although you argue that the requested records implicate the investigated employee's "false-light" privacy interests, we note that the Texas Supreme Court has recently held that the state of Texas does not recognize the tort of false-light invasion of privacy. *See Cain v. Hearst Corp.*, 1994 WL 278365 (Tex., June 22, 1994) (No. D-4171). Consequently, the university may not withhold the allegations from the public pursuant to common-law privacy merely because they may be untrue.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under common-law privacy, information may be withheld if:

- (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

Industrial Found. v. Texas Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

You claim that the information submitted to us for review is protected by the doctrine of common-law privacy. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files in *Ellen* contained individual witness and victim statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. 840 S.W.2d 519. The court held that the nature of the information, *i.e.*, names of witnesses and detailed affidavits regarding allegations of sexual harassment, was exactly the kind specifically excluded from disclosure under the privacy exception as described in *Industrial Foundation*. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* We think the holding in *Ellen* is controlling on the documents at issue in this case.

We have examined the records that you seek to withhold under section 552.101. Included among them are a summary of sexual harassment allegations and findings, complaints, witness statements, investigation notes, and various other records relating to the sexual harassment investigation. We conclude that the department must withhold the investigator's notes of interviews with, and written statements made by, the complainant and witnesses under section 552.101 of the Government Code in accordance with the court's holding in *Ellen*. However, the department must release the remaining

information as indicated.² We have marked the type of information that identifies or tends to identify the complainants and witnesses in those records that must be released to the requestors.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Enclosures: Marked documents

Ref.: ID# 27245

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²Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of this somewhat embarrassing information greatly outweighs any privacy interest the accused may have. See *Ellen*, 840 S.W.2d at 525. Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in knowing about the job performance of public employees. See Open Records Decision Nos. 444 (1986); 405 (1983).

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